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86-408

NO.

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1986

JOHN DONALD MASSOUD, PETITIONER

V.

THE STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI FROM THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS, TEXAS

CRIMINAL CASE

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QUESTIONS PRESENTED

(1). Could the Dallas County Assistant District Attorney Gerald R. Banks withhold evidence favorable to petitioner on guilt or punishment, after specifically requested written motion was filed under Brady v. Maryland 373 U.S. 83, 83 S. Ct. 1194 10 L.Ed 215 (1963)?

(2) Could the Court, recipient of specifically requested Brady material from the Dallas prosecutor, prevent the Dallas District Attorney's Office from complying with Brady supra?

(3) Could the trial court receive evidence requested by specific written motion and sua sponte seal the material and deny the petitioner the right to raise the issue to the jury?

(4) Could the Petitioner be denied his fundamental right of review of his double jeopardy claim because oral motion was made rather than a written motion as required by the Old Texas Code of Crim. Proc. Ann. art. 27.05 (Vernon Supp. 1985) and art. 27.06 (Vernon 1966)?

(5) Could an oral request for Plea in Bar Double Jeopardy be the equivalent of a written request? (B) If so, what standard attaches to the oral request in the case at bar, and (C) should relief be granted on this basis?

(6) Could the Petitioner be denied effective assistance of counsel for trial counselor failing to file Written Plea in Bar under Texas Code of Crim. Proc. Ann. Art. 27.05 (Vernon Supp. 1985) and art. 27.06 (Vernon 1966) and raise the defense of double jeopardy?

PARTIES TO THE PROCEEDINGS

TEX MCCONATHY

HENRY WADE

ROBERT HUTTASH

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FROM THE FIFTHE SUPREME JUDICIAL DISTRICT

COURT OF TEXAS AT DALLAS, TEXAS

CRIMINAL CASE

PRAYER

The Petitioner John Donald Massoud respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Supreme Judicial District Court of Dallas, Texas. Petitioner filed Petition for Discretionary Review in Austin, Texas. Petition was denied and judgment rendered July 9, 1986.

OPINION BELOW

The written opinion of the Fifth Supreme Judicial District Court, Dallas, Texas (Appendix A-1) and Petition for Discretionary Review refusal, from the Court of Criminal Appeals, Austin, Texas (appendix B-4) appears in the appendixes hereto. The opinion was unpublished.

JURISDICTION

The denial of Petiton for Discretionary Review of the Court of Criminal Appeals, appears below (Appendix B-3) (filed March 13, 1986). The Petitioner's denial of his motion for rehearing, timely filed (Appendix B-2), was denied on July 9, 1986. It is final by its terms. This petition was filed within 60 days of the rendered date of the judgment from the Court of Criminal Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONTSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;. . . "

2. The Sixth Amendment, United States Constitution, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. Tne Fourteenth Amendment, Section One, Due Process of Law, United States Constitution, which provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

STATE OF TEXAS STATUTORY PROVISIONS INVOLVED

1. The Texas Code of Criminal Procedure, art. 27.05, Defendant's Special Plea, which provides:

> A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:
>
> (1) resulted in acquittal;
>
> (2) resulted in conviction;
>
> (3) was improperly terminated; or
>
> (4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

2. The Texas Code of Criminal Procedure, art. 27.06 Special Plea Verified, which provides:

" Every special plea shall be verified by the affidavit of the defendant."

3. The Texas Penal Code, sec. 15.03, Criminal Conspiracy; Texas Penal Code, sec. 29.02, Robbery; and Texas Penal Code, sec. 29.03, Aggravated Robbery are not applicable to this Petition for Writ of Certiorari.

STATEMENT OF FACTS OF THE CASE

(1). The Defendant John Donald Massoud was brought to trial on charge of Solicitation of Aggravated Robbery, a second degree felony: Petitioner was convicted of paying Hugh Amos, (an undercover detective with Dallas Police Department) to forcibly take the billfold from Bill Seifert to obtain certain business cards from the billfold. The charge arose out of a civil dispute involving the Petitioner and Mr. Bill Seifert. The defendant filed Application for Injunction and Receivership, Cause NO. 81-10170a on September 9, 1981, in the 14th Judicial District Court of Dallas County, Texas, Defense Exhibit No. 2. (R.III-681) The Defendant's Original Petition was granted against William Seifert, Mr. Glass Co., Evelyn Seifert, Mobile Glass Co., and Sisc Corp. in an order signed by the Honorable

John Marshall, Judge of the 14th District Court of Dallas County, Texas, and a restraining order became effective September 9, 1981, at 2:14 p.m.

Subsequent to the civil litigation order granted on September 9, 1981, the Petitioner began receiving threats against his family, especially involving his blind and retarded daughter Michelle. (R.II-376) He also began receiving harassing phone calls, and his family was placed under surveillance. A .38 caliber lead bullet was taped to his younger daughter's house and attempts to run over his blind daughter Michelle were made by the stepson of Bill Seifert. (R.II-375, 376, 377)

During the course of civil litigation and after the threats on his family, the Appellant discovered Bill Seifert had diverted ($100,000.00) one hundred thousand dollars a year from the defendant's business during his employment; Also, Mr. Seifert had

hired Bob Denson, a Dallas Private Investigator to work in his behalf.

(2). The chief witness in the case, Detective Hugh Amos, was solicited by Police Officers Falgout and Robertson. Officers Falgout and Robertson were working for Private Investigator Denson, against departmental policy and performing illegal functions for Denson in the employment of Bill Seifert and Bob Denson (evidence sealed by the Court), Police Internal Affairs File) Amos subsequently taped all conversations with the defendant which led to the filing of the cause. Amos testified he later learned that Officers Falgout and Robertson were working for Bob Denson on the civil case involving Massoud and Seifert and were suspended for their involvement with Bob Denson, a private investigator, and their untruthful statements to Prosecutor Gerald R. Banks about their prior involvement with Mr.

Denson and Mr. Seifert. (R-II-298-306.) Amos did not mention his involvement with Private Investigator Denson and all evidence relating thereto was sealed by the Court, Court's Exhibit No. 1, Dallas Police Internal Affairs File.

(3). On the 5th day of July, 1983, Cause Number F-82-85921-JV, The State of Texas v. John Donald Massoud was called to trial. A pre-trial was held and the trial court ruled on the motions filed by the defense. (R-I-17) The voir dire examination of the prospective veniremen began. The jury selected for this cause was sworn by the court on July 5, 1983, cautioned and admonished by the court and placed in recess until the following day, July 6, 1983. Thereafter, the defendant was read the indictment outside the presence of the jury by the Assistant District Attorney Gerald R. Banks. The defendant's plea was not guilty. The court and jury stood in

recess until July 6, 1983. (R-I-18,19)

On July 6, 1983, the trial court overruled the defense motion for Police Internal Affairs File and a tape-recorded conversation between Assistant District Attorney Gerald R. Banks and Mr. Bob Denson to be examined and used as evidence. The court read the Internal Affairs Report and listened to the tape. The court stated they were not admissible or applicable in this case and sealed the evidence and marked it Court's Exhibit No. 1 and Court's Exhibit No. 2. Subsequent to the hearing, the court heard testimony from two jurors previously selected, impaneled, and sworn. After hearing testimony, the court over the objection of the defense dismissed the previously sworn jurors. The court then declared a mistrial sua sponte since there were only (10) ten sworn jurors remaining in the cause, all over the objection by the

defense. (R.I-20-28) The jury was discharged and the case was passed until another date. (R.I-28,29)

(4). On the 3rd day of October, 1983, Cause Number F-82-85921-JV was again called to trial in the 292nd Judicial District Court of Dallas County, Texas, The State of Texas v. John Donald Massoud. (R.I-2) The defendant orally objected and submitted to the court that jeopardy had attached and respectfully requested the court to dismiss the case. The request was denied and case continued for trial. (R.I-3) Whereupon, the jury selected for this cause was duly sworn and placed in recess. (R.I-32)

The court after recessing the jury considered defendant's Motion for Discovery, a motion styled after Brady v. Maryland, 373 U.S. 83, S.Ct. 1194, 10 L.Ed.215 (1963), for anything which would include exculpatory or

mitigating evidence, or anything that would be intended to impeach a witness. Defense offered Exhibit No. 1, an article printed in the Dallas Morning News, Wednesday, March 2, 1983. Assistant District Attorney Banks related to the court that he did not know anyone who would testify about the persons named in Defense Exhibit No. 1, Officer Falgout, Officer Robertson, or Mr. Bob Denson. The court's question to Mr. Banks was,

"THE COURT: ...you do not know of any reputation witnesses that exist that would come down here and testify that these peoples' general reputation for truth and veracity in the community is bad?

MR. BANKS: "Quite the contrary, Judge, I think they would say differently and they still enjoy a good reputation for good truth and veracity. There is nothing in those statements or anything that they have

testified to that is exculpatory as to the Defendant's guilt and there is nothing mitigating as to his punishment."

THE COURT: " That is fine. Since there is no reputation testimony available that you know of that the reputation is bad for truth and veracity and since I don't believe the law contemplates offering an opinion testimony or anthing like that, I believe according to your representation, the motion has been complied with. (R.I-33)."

Mr. Banks further acknowledged his prior knowledge of the article and his knowledge of the lies the two police officers told. Mr. Banks stated that the police officers would testify as to the inconsistent statements if called to the stand. (R.I-38,39) These statements were made by Mr. Banks in response to Defense Exhibit No. 1 (R.I-41)

(5). The Appellant's theory was he was set up by agents, police officers, and private

investigators working for Bill Seifert, and he went along so he might be able to gain evidence about the conspiracy against him. (R.II- 392, 396, 399, 403, 435, 438)

Jury found the defendant guilty of Criminal Solicitation of Aggrevated Robbery as charged in the indictment. The defendant elected for punishment by the court and received (7) seven years confinement in the Texas Department of Corrections. Defendant gave notice of appeal to the Fifth Supreme Judicial District of Dallas, Texas and to the Texas Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

(1). THIS DECISION FROM THE APPEALS STATE COURT CONFLICTS WITH FEDERAL COURT OF APPEALS AND SUPREME COURT OF THE UNITED STATES ON A QUESTION OF FEDERAL LAW.

On the 5th day of July, 1983, the pre-trial was conducted and Petitioner's Attorney requested specific Brady Motions. On July 6, 1983 the trial court overruled the defense motion for Dallas Police Internal Affairs File on Clarence Robertson and James Falgout and a tape-recorded conversation between Assistant District Attorney Gerald R. Banks and Private Investigator Bob Denson, marked and sealed court exhibits number 1 and 2, (R-I-17) to be admitted as evidence. The Court sealed the evidence from the jury and a mistrial occurred that day. On the 3rd day of October, 1983, the Petitioner through his counsel re-urged his Brady Motion for Police Internal Affairs File on Falgout and

Robertson, and the tape recording of District Attorney Banks and Private Investigator Bob Denson. His counsel also entered an oral plea of former jeapordy plea and both were denied (R-I-33-41). Brady v. Maryland, 373 U.S. 83, 83 S. Ct 1194, 10 L.Ed 2d 215 (1963), held that a defendant has a constitutional right to information which is favorable to him possessed by the prosecution. In order to extablish a violation of Brady a defendant must show that the information was material either on the issue of guilt or the issue of punishment. Id.

A subsequent decision, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed 342 (1976), held that if the defendant makes only a general request, or no request at all, he must show that the undisclosed information created a reasonable doubt that did not otherwise exist. However, according to Brady and Agurs if a defendant makes a specific

request, he need only show that the information might have affected the outcome of the trial. United States v. Agurs, supra.

This was the law which governed the prosecutor's duty at the time of the trial of the Petitioner's case.

Subsequent to the instant case becoming final in the states courts, the United States Supreme Court decided United States v. Bagley 105 S.Ct. 3375, 87 L.Ed 2d 481 (1985). It is not clear to Petitioner whether Bagley is retroactive. The Fifth Circuit in Lindsey v. King, 769 F.2d 1034 (5th Circuit) discussed Brady, Agurs, and Bagley; Eight Justices decided Bagley, and five held that "a const--tutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that it's suppression undermines confidence in the outcome of the Trial." Lindsey v. King at 1041, citing United States v. Bagley. The Fifth Circuit

said that two Justices would have applied a rule of Automatic Reversal, and one would use the standard of reversing if there was any reasonable likelihood that the undisclosed matter could have affected the judgment of the trier of fact. Id. The Fifth Circuit stated,

"Viewing the opinions as a whole, it is fair to say that all of the participating Justices agreed on one thing at least: that reversal for suppression of evidence by the government is most likely where the request for it was specific." In the Petitioner's case, there was a specific request; it is submitted that the standard is restrictive of the two set out in Agurs, or is that as quoted above from Lindsey v. King interpreting Bagley.

The United States Court of Appeals from the Tenth Circuit decided Chaney v. Brown 730 F2d 1334 (10th Cir.), cert. denied, 105

S.Ct. 601, 83 L.Ed. 710 (1984). The legal importance of Chaney relates to the Petitioner's case in that the request made there was held to be a specific one, and the standard of materiality applied was as follow:

> The pre-trial request of Chaney for exculpatory or favorable evidence was specific so that under Agurs the Constitutional test to determine the materielity of the withheld evidence is whether the evidence "might have affected" the verdict of guilt or the punishment imposed. Id at 1339.

Since this is a case from the United States Court of Appeals, which has not been overruled or modified, Petitioner submits the legal test for materiality is as set out in Chaney, supra.

The Order denying the States Petition for rehearing cleared the air as to which

legal test to apply.

We remain convinced that our holding is correct, particularly in light of the general rule that "evidence must be reviewed under the Agurs specific request standard when there is uncertainty about the request". King v. Ponte, 717 F2nd 635, 640 (1st Cir 1983) (citing United States ex. rel. Margeno v. Gengler, 574 F.2d 730, 736 (3rd Cir. 1978).

In the Petitioner's case, the trial court found that the items requested did not contain anything "exculpatory in nature or anything that would mitigate punishment" and trial court declined to permit discovery.

The Fifth Supreme Judicial District in Dallas wrote "by submitting the evidence to the Court for Judicial determination of its discoverability, the prosecutor complied with the requirements of Brady and Agurs. The Fifth Supreme Judicial concluded prosecution

action did not violate Petitioner's Fifth Amendment right to due process, (Court's opinion) and applied the standard contrary to Federal Court of Appeal decision and conflict between Supreme Court on a matter of federal law. The Texas Court of Criminal Appeals and the Fifth Supreme Judicial District applied the wrong legal test for materiality.

APPLYING THE PROPER TEST TO THE REQUEST MADE IN THE CASE AT BAR, THE WRIT SHOULD BE GRANTED.

In the Case at Bar, the evidence once unsealed did reveal the police Internal Affair's Report with (1) sworn affidavit from the Prosecutor Banks, that if Falgout, Robertson or Investigator Denson were called to the stand they would lie about their involvement with Seifert. (Sealed Court Exhibit No. One). This is exactly opposite of the Prosecutor's statement to the Court on October 3, 1983. In response to Defendant's

Brady motion and Dallas Morning News article on March 2, 1983, the Court asked Prosecutor Banks if he knew persons who would testify that Falgout, Robertson, or Private Investigator Bob Denson's general reputation for truth and veracity in the community is bad? The Prosecutor,s was, response "Quite the contrary, Judge, I think they would say differently and they still enjoy a good reputation for good truth and veracity". The Court replied, "I believe according to your representations the motion has been complied with". (R-I-33-41). This statement was made eight months after he signed the affidavit for the Dallas Police Department. Prosecutor Banks also knew Officers Falgout and Robertson had been suspended from the Dallas Police Department prior to the trial and now worked for Private Investigator Bob Denson. A letter from the Dallas Chief of Police, Billy Prince, stating "As a result of your

prior investigation of Mr. Massoud for Private Investigator Bob Denson, your credibility as a witness in a criminal trial involving Mr. Massoud is tainted". (Court Sealed Exhibit No. 1) Also, the officers had given written statements about their involvement. (Court Sealed Exhibit No. 1) The Chief of Police also wrote, "You were untruthful to Mr. Banks, and as a result of your actions, your credibility as a witness in a criminal trial involving Mr. Massoud is tainted. These officers of twenty years of service each were suspended and later resigned from the Dallas Police Department because of their activity in the Massoud case while working for Private Investigator Denson and Mr. Seifert.

The question of the tape connecting District Attorney Banks and Private Investigator Denson is most important because it supports his defensive theory of

conspiracy to convict Petitioner in order for Bill Seifert to prevail in the civil case still pending. A review of the sealed tape by the Court will reveal Investigator Denson, stating "You're not going to get in trouble on it is what I'm telling you". (Court sealed Exhibit no. 2) Denson, also states "He (Baggett, Seifert's Civil Attorney) is counting on the crux of Massoud's criminal case to win Seifert's civil case, as he told you in the meeting". (Court sealed Exhibit no. 2).

The Court stated, I have reviewed the tape at length and reviewed even the small children's voices on the tape. (R-I-20) This Petitioner's attorney reviewed the tape, also, and found no little children's voice in any part of the tape. The only voices were District Attorney Banks and Private Investigator Denson. We contend the Court never heard the real evidence. The Court heard a tape but not the tape that supported

the defensive theory.

In Chaney supra., the issued focused on the death penalty, because the withheld evidence might have affected the sentence of death recommended by the joiners, or one of them, the sentence to death was invalidated. The evidence withheld about the only suspect, if presented to the jury in conjunction with prior misidentifications by "eyewitness", met the test of might have affected the verdict of the jurors, or one of them.

WRIT SHOULD BE GRANTED.

In Falkins v. State, supra. armed robbery conviction was reversed by the Supreme Court of Louisiana because the prosecution suppressed exculpatory information after a specific oral request. The prosecutor in the case did not review the evidence as exculpatory, much like the prosecutor in the Petitioner's case, with his limited conception of exculpatory evidence.

The Court held that the nondisclosure denied the Defendant a fair trial; the conviction was reversed.

WRIT SHOULD BE GRANTED.

In Lundsey v. King, supra. the prosecutor withheld a statement which could have impeached a particular witness. His reasoning was he believed it to be mistaken. The conviction and sentence for murder were reversed. The court in dealing with the prosecutor claimed that the material did not exist, in much like the Petitioner's case.

The Fifth Circuit stated, "it was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible, especially where - as here - they were in the nature of an admission against states interest in prosecuting Lindsey. 769. F. 2d at 1040 (emphasis added).

In the Lindsey v. King opinion, with

regards to the impeaching evidence in Bagley, the Court stated, based on their Courtroom experience, that the withheld evidence carried the potential both for destruction of one witness and .....the discrediting, in some degree, of the police methods employed in assembling the case against him. Id. at 1042.

The Fifth Supreme Court of Appeals, in reaching its decision to affirm did not apply the proper legal test to the case at bar. The trial court used the improper legal test and the Court of Criminal Appeals summarily denied Petition for Descretionary Review.

My using the standard in Lindsey v King, supra., Chaney, supra. Bagley supra., the State,s chief witnesses could have been impeached and testimony destroyed or discredited if the jury had been privy to (1) tape recording of Assistant District Attorney Gerald R. Banks and Bob Denson. (Court sealed

Exhibit No. 2). and (2) the police internal affairs report concerning Officer Falgout, and Robertson, and Denson, (Court sealed Exhibit No. 1). Detective Amos was solicited by Officers Falgout and Robertson. He drove Bob Denson's car at all the meetings with Petitioner; he reported back to Denson after each meeting with Petitioner; and he allowed Investigator Denson to be present when he arrested the Petitioner. All the specifically requested information was sealed by the Court. The tape speaks for itself. When is the Assistant District Attorney to Henry Wade going to be told, "You're not going to get in trouble," or "We're counting on the crux of the criminal case to win the civil case, as we told you in the meeting". (Court sealed Exhibit No. 2). Petitioner contends the District Trial Judge never heard that tape. It does not have little children's voices on that tape.

WRIT SHOULD BE GRANTED.

THE TRIAL COURT ABUSEED ITS DISCRETION BY SUPPRESSING THE EVIDENCE DENYING THE PETITIONER A FAIR TRIAL, THUS CREATING THE CONSTITUTIONAL VIOLATION. THE EVIDENCE WITHHELD WAS IMPERATIVE TO HIS DEFENSE. THIS VIOLATION OCCURRED AFTER NUMEROUS SPECIFIC REQUESTS BY THE PETITIONER IN VIOLATION OF AGURS, SUPRA, LINDSEY V. KING SUPRA, BAGLEY SUPRA.

The Defense knew what they were looking for, and that they needed the Court's sealed Exhibits 1 and 2 to have evidence to prove defense theory: (1) that Bill Seifert needed conviction of the Petitioner in order for Bill Seifert to win his civil case against Petitioner and that (2) Denson, Officer's Falgout and Robertson, and OFFICER HUGH AMOS were working for Bill Seifert in order to obtain the conviction.

The evidence was in the Police Internal Affair's File, section 15. There were tape

recorded converstations in the file incriminating the police for illegal wrong doing in this case. There was supensions, loss in pay and the officers leaving the force. There was evidence in the Police Internal Affair's file, that Hugh Amos, the States chief witness was also working for Bob Denson and Bill Seifert. On February 1, 1983, Lt. Ratley contacted Mr. Bob Denson by telephone, and a recording was made on court's sealed Exhibit No 1, a taped conversation between Lt. Ratley and Mr. Bob Denson:

LT. RATLEY: "Well, my main concern is the extent of the involvement with you. We might as well be truthful with each other. They have already told me they're working for you. They are in there writing letters now. Now I was just wondering, do you remember when they went to work for you?"

The appellant or his counsel was never made aware of any written confessions by

Officers Falgout and Robertson of all their involvement in the Massoud case while working for Denson, nor, is any in the Internal Affairs file. This is denial of due process as set forth in Brady v. Maryland, 83 S.Ct. 1194 (1963) and Freeman v. Georgia, 599 F.2d. 65 (5th Cir. 1979).

Mr. Banks further informed the District Attorney of Dallas County, Texas, Mr. Henry Wade, that the witnesses in the Massoud case were going to lie. No action was ever taken by Mr. Wade, District Attorney, Dallas County, Texas to stop the trial.

Mr. Denson admitted to Lt. Ratley that Chief Jack Revell had worked for him and Capt. Gannoway. Denson also admitted that Falgout and Robertson had been working for him (1) one year. Mr. Denson admitted another Dallas Police Officer, Q.D., had worked for him. Lt. Ratley requested Mr. Denson to give him an affidavit, "an outline

of their involvement with you." Mr. Denson agreed, but later refused to give an affidavit when contacted on February 3, 1983. (Courts Sealed Exhibit No. 1, Investigation Report, p.4) Mr. Denson also stated to Lt. Ratley that he had learned that Mr. Banks had taped a conversation with him and had taken it to the Dallas Police Department.

Mr. Denson now goes further, this appellant contends and implicates Mr. Henry Wade, District Attorney, Dallas County, Texas.

MR. DENSON: " But I talked to Henry Wade last night who is a good friend of mine and whom I have been working with on this and his story was that Banks had told him that one of the officers had lied to him. Henry said he told him to get them down there with you and get it straightened out, that he didn't think it was fatal in this case. He said, ("I

> don't know why he taped you on that, why he taped that one up to the _____.") I said, ("Well, I don't either.") He said, "Well, that kind of publicity can hurt us bad" which it can and I didn't accomplish anything because all he did was blow his first witness out of the tub."

This statement by Denson shows some alliance between Mr. Bob Denson and Mr. Henry Wade. Freeman v. Georgia, 599 F2d 65 (5th Cir. 1979).

WRIT SHOULD BE GRANTED.

The Court of Criminal Appeals in Austin and the Fifth Supreme Judical District Court opinion concerning the Petitioners plea of double jeopardy are in conflict with that cf the Supreme Court as a matter of Federal Law concerning double jeopardy.

In Ground No. 1 of the opinion (Appendix A) the Appeals Court refused to rule on the

point stating he (Petitioner's Counselor) failed to file a verified written motion as required under the old TEX. CODE CRIM. PROC. ANN. 27.05 (Vernon Supp. 1985) and 27.06 (Vernon 1961), and stating question of Double Jeopardy properly raised was not proper with the Court.

This mistrial occurred on July 5, 1983 before Judge Keasler (R.-I-17) on October 3, 1983 the Petitioner made oral motion to Judge Keasler for dismissal of the indictment on double jeopardy grounds. Oral motion was denied and the Petitioner was convicted.

The jury was impaneled and sworn on July 5, 1983. (R-I-20-28) Therefore, jeopardy had attached under Crist v. Bretz. 437 U.S. 28, 98 S. Ct. 2156, Also, "jeopardy attaches in jury trials when the jury is impaneled and sworn" Benton v. Maryland 395 U.S. 784, 794-795, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707. The Fifth applies to the

States through the Fourteenth Amendment and the same constitutional standards apply equally to the States. In Arizonia v. Washington, 434 U.S. 497 (1978), United States v. Jones, 772 F.2d 632, requires a pleading of former jeopardy in order to protect the fundamental right. Petitioner made oral motion of former jeopardy and he states the statutory provisions of the State of Texas are in direct conflict with the fundamental right. The provision is not mandatory. Robinson v. Wade, 686 F2d 298, (5th Cir. 1982).

The Petitioner can meet the burden to tender a prima facie non-frivolous double jeopardy claim to this Supreme Court .

WRIT SHOULD BE GRANTED

The Court sua sponte over objection of the Petitioner dismissed two jurors after they were being impaneled and sworned. The Court cited "Manifest Necessity" for the

reason when the Court created the necessity by dismissing one juror who was too nervous and another who had a death in his family. Petitioner is entitled to have the review in light of United States v. Jones, 400 U.S. 470 (1970), as a fundamental right of review.

An oral request for Brady material can be equivalent to a written request. United States v. Montoya, 716 F2d 1340 (10th Cir. 1983). Therefore, the same standard should be applied to protect the Fifth and the Fourteenth Amendment fundamental right of former jeopardy.

The State of Texas is in conflict with the Federal Law.

WRIT SHOULD BE GRANTED.

Petitioner states he was denied effective assistance of counsel since the defense of formal jeopardy was not raised as required by verified motion under art. 27.05 and art. 27.06 of the Texas Code of Criminal

Procedure. The Petitioner claims his counsel's legal performance was deficient and the Petitioner was prejudiced for failure of counsel to follow the Texas Code of Criminal Procedure, Strickland v. Washington 104 S. Ct. 2052, 80 L.ed. 2d 674. (1984).

THE SUPREME COURT SHOULD GRANT THE WRIT

(1). To cure the conflicts in the Federal Law and Texas Law in the area of specifically requested Brady material.

(2). To, set the Standard for the proper legal test to be used in determining the admissiblility of specifically requested material or any requested material under Brady, supra, Agurs supra, Bagley, supra Lindsey supra, Chaney supra.

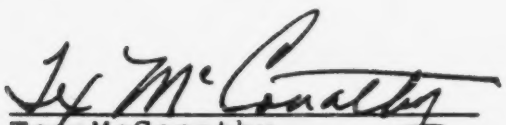
(3). To set the legal standard for preventing the trial court's ability to suppress requested Brady from the Defense and sealing such evidence sua sponte from the presence of the jury, over objection by the Defendant;

(4) To set the legal standard for raising and proper review of a Defendant's double jeopardy claim which would apply to the State of Texas under the Fourteenth Amendment, and (5). To set a legal standard, whereby a Defendant charged or indicted with a crime, could by legal discovery determine if there was improper or illegal police activity involved in obtaining the indictment or complaint?

CONCLUSION

The magnitude of the constitutional violations, the police illegal activity, the suppression of evidence by the District Attorney, and the Court denial the Petitioner a fair trial to the Petitioner are proper reasons to grant relief. The police are no longer with the Dallas Police Department and the District Attorney who prosecuted the case is no longer prosecuting. The Petitioner demands a fair trial with all the evidence presented to the jury. The Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,



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(Appendix A)

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-83-01318-CR

JOHN DONALD MASSOUD,
APPELLANT,

V.

THE STATE OF TEXAS
APPELLEE.

FROM A DISTRICT COURT

OF DALLAS COUNTY TEXAS

BEFORE JUSTICES STEPHENS, WHITHAM AND GUILLOT
OPINION BY JUSTICE STEPHENS
MARCH 4, 1985

Jonn Donald Massoud, convicted by a jury of criminal solicitation to commit aggravated robbery and sentenced to seven years imprisonment, appeals. In ten grounds of error, appellant contends that: (1) his convictions, after a prior mistrial, constituted double jeopardy; (2) he was denied due process because the prosecutor failed to disclose evidence, material to guilt or punishment, after a discovery motion

was filed; (3) the trial court abused its discretion by supressing evidence material to the defense; (4) the trial court erroneously admitted testimony of an extraneous offense or transaction; (5) the trial court erroneously permitted hearsay testimony to be elicited during trial; (6) he was denied effective assistance of counsel; (7) the indictment was fundamentally defective; (8) the evidence was insufficient to sustain a conviction; (9) the court erroneously stated the elements of aggravated robbery in its charge; and (10) the court's charge improperly enlarged the indictment. We disagree with each contention and, accordingly, affirm.

In his first ground of error, appellant contends his conviction is barred by double jeopardy. Although the record reflects appellant orally moved for dismissal of the proceedings on double jeopardy grounds, he

failed to file a verified written motion as required by TEX. CODE CRIM. PROC. ANN. articles 27.05 (Vernon Supp. 1985) and 27.06 (Vernon 1966). The question of double jeopardy is therefore not properly before this court. Murphy v. State, 669 S.W. 2d 320 (Tex. Crim. App. 1983) en banc; Galloway v. State, 420 S.W.2d 721 (Tex. Crim. App. 1967). Appellant's first ground of error is overruled.

In his second and third grounds of error, appellant contends he was denied due process because evidence material to the issues of his guilt or punishment was not disclosed in accordance with Brady v. Maryland, 373 U.S. 83 (1967). We disagree.

The evidence of which appellant complains consists of two items. The first item is a recording of a telephone conversation between Jerry Banks, the prosecuting attorney, and

Bob Denson, a private investigator who was employed by Bill Siefert, appellant's former partner, to obtain evidence for use in a civil action brought by appellant against Siefert. The second item is the Dallas Police Department's Internal Affairs file regarding official misconduct of two Dallas police officers, Falgout and Robertson. In response to appellant's request to review the evidence, the prosecutor submitted these two items to the court for an in camera inspection to determine whether they were discoverable. The court found that the items did not contain anything "exculpatory in nature or anything that would mitigate punishment" and declined to permit discovery. We conclude that by submitting the evidence to the court for a judicial determination of its discoverability, the prosecutor complied with the requirements of Brady. See United

States v. Agurs, 427 U.S. 97 (1978).

Having concluded the prosecutor's action did not violate appellant's right to due process, we now consider whether the trial court abused its discretion in denying appellant access to the evidence. The standard of review we must follow is whether the evidence sought is material to appellant's defense. Whitechurch v. States, 650 S.W2d 424, 425 (Tex. Crim. App. 1983), en banc; Quinones v. State, 592 S.W.2d 933 (Tex Crim. App. 1980), en banc, cert. denied, 449 U.S. 893 (1980). In determining materiality, the omission must be evaluated in the context of the entire record and constitutional error is committed only if the omitted evidence creates a reasonable doubt that did not otherwise exist. Whitechurch, 650 S.W.2d at 425.

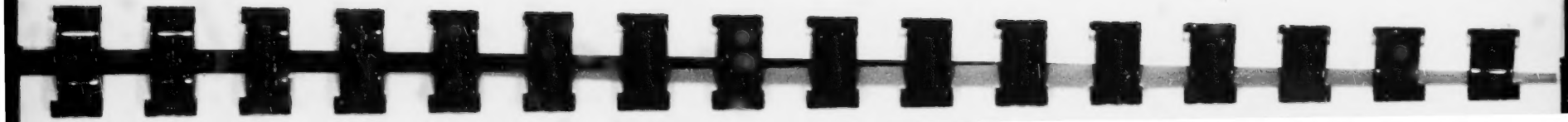
After fully reviewing the evidence of which appellant complains, we conclude that, in

light of the entire record, appellant was not denied access to any evidence material to his defense. The file revealed that the two police officers had been employed, contrary to police department policy, by Denson to assist him in obtaining evidence for the civil trial between appellant and Siefert. When the officers realized that a criminal matter was developing, they immediately discontinued their employment with Denson, and in fact refused to accept any pay from Denson for the work already done. Banks did not learn of the two officers' participation in the investigation of the civil matter until he was preparing for trial. Immediately upon learning of their involvement, Banks initiated a telephone call to Denson, the taped telephone conversation in issue, verifying the officers' involvement. He then consulted with District

Attorney Henry Wade and reported the matter to the Dallas Police Department.

All of these matters were fully developed at trial, except the fact that the telephone conversation shows that Banks and Denson were acquaintances, and that Banks had in fact visited in Denson's home, socially, on one or more previous occasions.

Appellant contends that the undeveloped evidence is material to show a conspiracy between Siefert and the district attorney's officer to "set-up" appellant. This contention is without merit. First, Banks was not involved in the police investigation of appellant's criminal activities and was unaware of the officer's prior involvement in the civil case until he was preparing for trial. Next, Banks' actions, after learning of the officer's involvment, were inconsistent with appellant's allegation of a



conspiracy. Further, we note that this theory is different from appellant's theory during trial. At trial appellant admitted his conversations with Sergeant Amos, the police investigator in charge of the criminal investigation, but denied any criminal intent to harm Bill Siefert. He testified that he believed Amos was working for Denson and that he was going along with Amos, hoping to gather evidence against Siefert. As we have stated previously, the excluded evidence showing the relationship between Falgout, Robertson, Denson, and Siefert, as well as the evidence describing Amos' role in the investigation, was fully developed at trial. There was never any question that Officers Falgout, Robertson, and Amos were "setting-up" appellant in the sense that they were working undercover to gather evidence to be used against him. The issue, resolved by the

jury against appellant, was not whether Amos was actually a "hit-man," but whether appellant possessed the requisite criminal intent, that is, whether he actually believed Amos would harm Siefert. Appellant's allegation of a conspiracy extending to the district attorney's office is not only unsupported by the evidence, but is immaterial to the question of that intent. Appellant's grounds of error two and three are overruled.

In his fourth ground of error, appellant contends the court erroneously permitted testimony of an extraneous offense or transaction. Danny Wood testified that appellant attempted to puchase dynamite from him and inquired whether two or three sticks of dynamite wrapped in foam rubber was sufficient to blow up a four to five thousand square foot building. He further testified

that appellant told him he wanted the building destroyed because the person who owned the building owed him approximately five hundred thousand dollars. Wood was called as a witness after appellant had testified and had affirmatively denied his criminal intent, and had further denied making any statements to Wood regarding purchasing dynamite or destroying a building. Although evidence of extraneous offenses is generally not admissible, the evidence in this case was admissible to show intent or scheme, or to refute appellant's defensive theory. Sewell v. State, 629 S.W.2d 42 (Tex. Crim. App. 1982), Chambers v. State, 601 S.W.2d 360 (Tex. Crim. App. 1980). Appellant's fourth ground of error is overruled.

In his fifth ground of error, appellant complains the court erroneously permitted the

introduction of hearsay evidence. First, appellant contends the testimony of Joe McMurtrie is "full of hearsay." No objection was made during trial, and, on appeal, appellant fails to identify the specific testimony of which he is complaining. Therefore, nothing is presented for review. Cook v. State, 611 S.W.2d 83 (Tex. Crim. App. 1981). Next, appellant complains the tapes of conversations between appellant and Amos were hearsay because the State failed to properly authenticate the tapes. The record reflects that appellant's counsel affirmatively waived objection to the introduction of the tapes and that appellant later testified that he had no reason to doubt the authenticity of any of the tapes. Error, if any, was therefore invited, and now appellant may not be heard to complain. Ex parte Guerrero, 521 S.W.2d 613 (Tex. Crim.

App. 1975). Next, appellant complains that the testimony of Captain Oney is "rank hearsay." Appellant cites no reference to the record indicating where the error complained of occurred; therefore, nothing is presented for review. Brown v. State, 605 S.W.2d 572 (Tex. Crim. App. 1980). Further, Captain Oney testified only during the punishment phase of the trial. Since the court determined punishment, we must presume it disregarded any inadmissible testimony. Kenn v. State, 626 S.W.2d 309 (Tex. Crim. App. 1981). Finally, appellant complains the entire testimony of Cheryl Jerome should be stricken from the record because she is currently employed by the Dallas County Attorney's office and her testimony was therefore in violation of the Texas Code of Professional Responsibility. The record reflects that Jerome was not employed by

the District Attorney's Office when she testified in this case. Appellant cites no authority that a person's testimony must never be considered if he or she later becomes associated with one of the attorneys involved in the litigation. We find none. Therefore, nothing is presented for review. Brookds v. State, 642 S.W.2d 791 (Tex. Crim. App. 1982). Appellant's fifth ground of error is overruled.

In his sixth ground of error appellant contends that he was denied effective assistance of counsel because his attorney repeatedly failed to object to the introduction of "inadmissible hearsay evidence and extraneous offenses." Appellant fails to direct this Court's attention to the record indicating where these omissions by counsel occurred; therefore, nothing is presented on review. Cook, 611 S.W.2d at 87.

Appellant's sixth ground of error is overruled.

In his seventh ground of error, appellant contends the indictment is fundamentally defective because it fails to allege all of the essential elements of robbery. We disagree. Upon review of the indictment, we conclude that the indictment adequately set out the elements of both criminal soliciation, TEX. PENAL CODE ANN. Sec. 29.02, 29.03 (VErnon 1974). See Rohlfing v. State, 612 S.W.2d 598 (Tex. Crim. App. 1981). Appellant's seventh ground of error is overruled.

In his eighth ground of error, appellant contends the evidence is not sufficient to support a conviction. We disagree. When the sufficiency of the evidence is challenged,the standard of review is, viewing the evidence in the light most favorable to the verdict,

whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Wilson v. State, 654 S.W. 2d 465 (Tex. Crim. App. 1983). During one of the taped conversations between appellant and Amos, appellant told Amos he wanted Siefert's right hand broke, . . . and . . . one leg broke." During a different conversation he stated, "why don't you act like you're gonna rob this boy -- make it look good." He told Amos he wanted the business cards out of Siefert's billford, but that Amos could keep Siefert's watch, rings, and any money. We conclude the evidence is sufficient to support the conviction. Appellant's eighth ground of error is overruled.

In his ninth ground of error, appellant contends the trial court committed fundamental error by failing to instruct the jury on the correct elements of aggravated

robbery. We have reviewed the definitions in the court's charge which appellant urges were erroneous, and find no error. The court's omission of the word "recklessly" and its further omission of the alternative element of "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death," from the definition of robbery, TEX. PENAL CODE ANN. 29.02 (Vernon 1974), benefitted appellant by restricting the elements of the charge from which appellant could have been found guilty. Error, if any, was therefore harmless. Since no objection was made at trial and fundamental error was not committed, nothing is presented for review. Henderson v. State, 117 S.W.2d 697 (Tex. Crim. App. 1981).

In his final ground of error, appellant contends the court's charge has enlarged the indictment. We disagree. The indictment

alleges that appellant "did unlawfully, then and there with intent that a felony of the first degree be committed, namely: aggravated robbery, knowingly and intentionally request, command, and attempt to induce another . . ." (emphasis added). The Court's charge tracks this language, however, it omits the word "command", and substitutes the word "or" for the word "and." The omission of the word "command" in the charge restricted rather than enlarged the indictment. Error, if any, caused by the court's omission, was therefore harmless. Further, since appellant failed to object to the charge nothing is presented for review. White v. State, 610 S.W.2d 504 (Tex. Crim. App. 1981). Finally, it is not error for the indictment to allege the different ways of committing the offense in the conjunctive and for the jury to be charged disjunctively. Vasquez v. State, 665

S.W.2d 484 (Tex. Crim. App. 1984) en banc; Vaughn v. State, 634 S.W.2d 310 (Tex. Crim. App. 1982). Appellant's final ground of error is overruled.

Affirmed.

/s/ Bill J. Stephens

BILL J. STEPHENS
JUSTICE

Do Not Publish
Rule 207

(Appendix B)

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-83-01318-CR

JOHN DONALD MASSOUD, APPELLANT	FROM A DISTRICT COURT
V.	
THE STATE OF TEXAS APPELLEE.	OF DALLAS COUNTY TEXAS

ORDER

Appellant's July 15, 1986 motion to stay issuance of mandate is GRANTED. The clerk is ORDERED not to issue the mandate in this case before September 22, 1986, to permit the timely filing of an appeal or petition for writ of certiorari to the Supreme Court of the United States.

July 23, 1986.

/s/ Bill J. Stephens

BILL J. STEPHENS
JUSTICE

B-2

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 05552-85

JOHN DONALD MASSOUD APPELLANT	FROM THE FIFTH COURT OF APPEALS
V.	CASE NO. 05-83-01318CR
THE STATE OF TEXAS APPELLEE.	OF DALLAS COUNTY TEXAS

Appellants' Motion for Rehearing was denied.

DATED this 9th day of July, 1986.

Thomas Lowe,
Clerk

B-3

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 05552-85

JOHN DONALD MASSOUD APPELLANT	FROM THE FIFTH COURT OF APPEALS
V.	CASE NO. 05-83-01318CR
THE STATE OF TEXAS APPELLEE.	OF DALLAS COUNTY TEXAS

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Judges Teague & Miller would grant on grounds No. 2 & 3.

DATED this 26th day of February, 1986.

Thomas Lowe,
Clerk

B-5

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 05552-85

JOHN DONALD MASSOUD APPELLANT	FROM THE FIFTH COURT OF APPEALS
V.	CASE NO. 05-83-01318CR
THE STATE OF TEXAS APPELLEE.	OF DALLAS COUNTY TEXAS

I have this day received and filed the State's response to the appellant's petition for discretionary review.

DATED this 12th day of June, 1986.

Thomas Lowe,
Clerk

B-6

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 05552-85

JOHN DONALD MASSOUD APPELLANT	FROM THE FIFTH COURT OF APPEALS
V.	CASE NO. 05-83-01318CR
THE STATE OF TEXAS APPELLEE.	OF DALLAS COUNTY TEXAS

I have this day received and filed the Appellant's petition for discretionary review.

DATED this 16th day of May, 1986.

Thomas Lowe,
Clerk

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-408

In The

Supreme Court of the United States

October Term, 1986

JOHN DONALD MASSOUD,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

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Dallas County, Texas

JEFFREY B. KECK
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October 8, 1986

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I. The Court of Appeals correctly concluded that the allegedly "exculpatory evidence" tendered by the prosecutor to the trial court was not material to Petitioner's defensive theory and that the facts which would have been established by such evidence were before the jury from another source. Because of the immateriality of the evidence in question, the instant case is an improper vehicle for a resolution of any "conflict" between the circuits, if such conflict exists, in that the Court of Appeals' legal conclusions are not in conflict with any known principles of constitutional law. 8

II. The Court of Appeals correctly decided the Petitioner's double jeopardy claim on State procedural grounds. Even if this basis for the decision below was incorrect, the facts of the case clearly show that the trial court did not abuse its discretion in holding that the jurors in question were disabled, and therefore, "manifest necessity" required the termination of Petitioner's first trial. Accordingly, Petitioner's double jeopardy rights were not violated in the instant case. 11

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III. The Petitioner's ineffectiveness of counsel claim does not even facially present a federal question since Petitioner does not attempt to demonstrate that the ineffectiveness of counsel reulted in any actual "prejudice" to the Petitioner as that term is defined in *Strickland v. Washington.* 14

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No. 86-408

In The

Supreme Court of the United States

October Term, 1986

JOHN DONALD MASSOUD,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

The State of Texas, Respondent, by and through her Criminal District Attorney, files this brief in opposition to theh petition for writ of certiorari (hereinafter "petition") filed herein by John Donald Massoud, Petitioner. The petition was received by Respondent on September 10, 1986.

OPINION BELOW

Petitioner's recitations respecting the opinion of the Court of Appeals for the Fifth Supreme Judicial District

of Texas, and the denial of Petitioner's subsequent petition for discretionary review by the Court of Criminal Appeals of Texas are correct. *See* Rule 34.2 of the Rules of this Court. The opinion of the Court of Appeals is set forth in the Appendix of the petition and is not duplicated in this brief.

JURISDICTION

The Petitioner's factual recitations regarding jurisdiction are correct, as is the recitation that 28 U.S.C. § 1257 (3) confers jurisdiction upon this Court to hear cases involving a constitutionally protected "title, right, privilege, or immunity."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although Petitioner has set forth the relevant constitutional provisions and *some* relevant Texas substantive and procedural statutes in his Appendix, Petitioner has omitted a reference to the following State statutes:

TEX. CODE CRIM. PROC. ANN. arts. 36.29 and 36.33
TEX. PENAL CODE ANN. §§ 15.03, 29.02 and 29.03.

These statutes are set forth in the Appendix of this brief.

STATEMENT OF THE CASE

Petitioner was charged by indictment (R.I-3) with the offense of criminal solicitation, conduct proscribed by TEX.

PENAL CODE ANN. § 15.03 (a) (Vernon 1974). The felony solicited by the petitioner was aggravated robbery.[1]

The Petitioner's first trial was terminated on the morning of July 6, 1983, when, after the trial had been impaneled and sworn and the Appellant had entered a plea of not guilty, the trial court determined that two jurors had become disabled. The trial court then declared a mistrial. Juror Tadesa advised the trial court that she had suffered from depression in the past, that over night she had become aware that serving on the jury was aggravating her emotional anxiety and that her anxiety would prevent her from functioning as a juror. Both parties declined opportunities to examine to Tadesa and the trial court then excused Tadesa over Petitioner's general objection. The trial court found that Tadesa's mental condition rendered her "incapable of serving on the jury." (R.II-23-24). A second juror, Luckett, then testified that early in the morning that he had learned that his brother had committed suicide and that it would be better for all concerned if he were off the jury. The trial court weighed the choice between excusing Luckett temporarily or excusing him permanently and declaring a mistrial. The petitioner did not object to Luckett being found temporarily disabled. However, after the trial court decided to excuse Luckett permanently, the Appellant objected to the trial court's declaration of a mistrial. Pursuant to this Court's recommendation in *Arizona v. Washington*, 434 U.S. 497, 519, 98 S.Ct. 824, 836, 54 L.Ed.2d 717 (1979), the trial court entered a written order declaring mistrial and stating its reasons therefore. (R.I-28).[2]

---

[1] Conduct proscribed by TEX. PENAL CODE ANN. § 29.03(b) (Vernon 1974).

[2] A copy of the written order of the trial court is attached to the Appendix of this brief.

On October 3-6, 1983, a second trial before a jury was had on the petitioner's plea of "not guilty." Petitioner was convicted by the jury and the punishment issue was submitted to the trial court which assessed punishment at seven years confinement in the Texas Department of Corrections. (R.I-49-51).

Basically the State's evidence demonstrated that during April of 1982, the petitioner had had several meetings with Dallas Police Sergeant Hugh Amos who had held himself out to Petitioner as a "hit man" and professional arsonist. Petitioner informed Amos that Petitioner's former business partner, Bill Seifert, had cheated him in connection with the operation and sale of an auto glass business the Appellant had sold to Seifert. Petitioner promised to pay Amos $13,000 if Amos would blow up the auto glass shop owned by Seifert and rob and severely beat Seifert. (R.IV-146-170).[3] The State introduced tape recordings of all these conversations after Petitioner had specifically waived any objection to them. The Petitioner subsequently admitted that the recordings were accurate and authentic. (R.IV-389-390). Petitioner was arrested on April 23, 1982, seconds after he had given Amos a $6,500. "down payment" for the robbery and beating of Seifert. (R.IV-220-226).

The Petitioner testified in his own behalf and, as noted above, admitted having had the conversations with Amos but also testified that he believed that Amos was employed by Bob Denson, a private investigator hired by Seifert. Petitioner asserted the all too familar "conducting my own

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[3] This was the arrangement ultimately agreed upon. In his earlier conversations with Amos, Petitioner had inquired about the possibility of having Seifert kidnapped and taken to Mexico and then imprisoned or killed.

investigation'' defense, which the Court will recognize as one frequently employed by criminal defendants and public officials caught up in undercover law enforcement operations. Petitioner testified that he continued to meet with Amos in the hope that he could connect Amos to Seifert through Denson. (R.IV-391-394). Petitioner testified that he gave Amos the ''down payment'' hoping to ''keep him involved in our situation for a later date.'' He testified that at the time he gave Amos the ''down payment'' he did not believe that Amos would actually harm Seifert and that he did not intent to have Seifert harmed. (R.IV-399-401).

However, the Petitioner's defense, however dubious on its face, became severely ''unraveled'' when, during its case in rebuttal, the State produced the testimony of Danny Wood. In 1982 Wood had operated a business specializing in dynamiting tree stumps. Wood testified that sometime in April of 1982, Petitioner had asked him to sell him some dynamite and told him that he wanted the explosives in order to blow up a 4,000 square foot building. Petitioner indicated that the owner of the building owed him $500,000. (R.IV-471-479). Apparently, Petitioner, who on cross-examination had denied meeting with Wood, neglected to mention his dealings with Wood to his trial counsel, who asked Wood no questions on cross-examination.

One other set of circumstances should be briefly mentioned since these facts are connected with Appellant's first three questions assigned for review. In March of 1982, immediately prior to the institution of formal police investigation of the Petitioner by Amos, the Petitioner's former business partner and the object of the aggravated robbery solicitation by Petitioner, Seifert, had learned from Joe McMurtrie, an auto glass installer who had worked for both

Petitioner and Seifert, that the Petitioner had called McMurtrie and requested his help in locating someone to "bump off" a person and to burn that person's place of business. (R.IV-15-23). Seifert then introduced McMurtrie to Clarence Robertson and Tim Falgout, who represented themselves to McMurtrie as being Dallas Police officers. Falgout and Robertson were in fact police officers, however they were also working for Seifert's private investigator, Denson, during their off-duty hours. After having lunch together, McMurtrie accompanied Falgout and Robertson to police headquarters. From this location McMurtrie placed a telephone call to Petitioner and his call was tape recorded. During the resulting conversation, McMurtrie told the Petitioner he had found a man to do the job and arranged for Petitioner to meet with the "hit man" (Sergeant Amos) the next day. (R.IV-25-29). The tape recording of this conversation was played for the jury. (R.IV-29-33).

At this point, Amos began the series of meetings with the Petitioner which ultimately resulted in Petitioner's arrest. Amos had become involved in the investigation after Falgout and Robertson had brought him the tape recorded telephone conversation between the Petitioner and McMurtrie. Amos then telephoned Petitioner and posing as the hit man, arranged to meet with Petitioner. (R.IV-72-90).

Although neither Robertson or Falgout testified at trial, Appellant complains that his rights under *Brady v. Maryland*, 373 U.S. 93, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), were violated because the trial court, after reviewing the Dallas Police Department's Internal Affairs Division's reports on the disciplinary actions taken against Falgout and Robertson, tendered to the court by the prosecutor prior to

trial, refused to permit the petitioner to have these materials. These materials show that when lead counsel for the State, Assistant District Attorney Jerry Banks, began preparing for the trial of Petitioner, he had met with Amos, Falgout and Robertson. Banks asked all three men if they had known anything relating to the case against the Petitioner prior to the time Falgout and Robertson had talked to McMurtrie. All three men denied such foreknowledge. Robertson and Falgout were prevaricating, since they had been working for Denson prior to this time in connection with Seifert's investigation of Petitioner. Upon learning that Robertson and Falgout had misrepresented their prior employment, Banks informed the Internal Affairs Division (IAD) of the Dallas Police Department. The IAD ultimately obtained written statements from Roberston and Falgout in which they admitted having worked for Denson. This private employment violated Dallas Police Department *policy* which prohibited police officers from working for private investigators. In addition, *any* outside employment by police officers was required to be approved by police department superiors and Robertson and Falgout had failed to seek any such permission. Although Petitioner characterizes the officers' conduct as "illegal," in fact, no State or Federal law was violated by their conduct, and the police department's prohibition of this type of outside employment was a policy of fairly recent origin.

Because of their multiple violations of departmental policies in working for Denson, many of which were totally unrelated to the investigation of the Petitioner, both Officers Falgout and Robertson were disciplined by suspensions from duty without pay, and reduction in rank. In addition, both officers were transferred out of the Department's Intelligence Division.

Significantly on direct examination at trial, Sergeant Amos testified concerning the disciplinary measures taken against Robertson and Falgout because their employment by Denson. Amos testified that both Falgout and Robertson had resigned from the Dallas Police Department rather than accept the disciplinary measures and had then gone to work for Denson as private investigators. Amos testified that he did not become aware of Falgout and Robertson's employment by Denson until well after the Petitioner's arrest. (R.IV-288-297). Amos was also cross-examined extensively on the subject by Petitioner's counsel. (R.IV-302-42).

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REASONS FOR NOT GRANTING WRIT

I.

The Court of Appeals correctly concluded that the allegedly "exculpatory evidence" tendered by the prosecutor to the trial court was not material to Petitioner's defensive theory and that the facts which would have been established by such evidence were before the jury from another source. Because of the immateriality of the evidence in question, the instant case is an improper vehicle for a resolution of any "conflict" between the circuits, if such conflict exists, in that the Court of Appeals' legal conclusions are not in conflict with any known principles of constitutional law.

The Petitioner's first three questions all relate the alleged violation of his right to be provided with exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner claims that the trial court's refusal to permit him to examine the IAD's

file concerning Robertson and Falgout, after the file had been tendered to the trial court by the prosecutor in accordance with the procedures outlined in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), deprived him of his rights under *Brady.*

The Court of Appeals, after reviewing all the documents in question, concluded that Petitioner was "not denied access to any evidence material to his defense." (Opinion at p. 5). As to Petitioner's claim that the internal affairs file was necessary to show "a conspiracy between Seifert and the district attorney's office to 'set up' Appellant." the Court of Appeals correctly held that this point was "without merit" because 1) the documents demonstrated that prosecutor Banks was in no way involved in the police investigation of the case against the Petitioner, 2) that Banks' action *after* learning of Falgout and Robertson's employment by Denson (i.e. informing the IAD was "inconsistent with appellant's allegation of a conspiracy," and 3) that Petitioner's "conspiracy" theory presented on appeal, was different from his defensive theory during trial. (Opinion at p. 6).

More importantly, the Court of Appeals correctly held that "evidence showing the relationship between Falgout, Robertson, Denson and Seifert, as well as the evidence describing Amos' role in the investigation was fully developed at trial." (Opinion at pp. 6-7).

Finally, the Court of Appeals correctly concluded, in light of Petitioner's conducting his own investigation defense, that the only real issue at trial was Petitioner's intent in meeting with Amos and whether the Petitioner "actually believed Amos would harm Seifert." The Pe-

titioner's allegation of the "conspiracy extending to the district attorney's office," said the Court, "is not only unsupported by the evidence but is immaterial to the question of that (Petitioner's) intent." (Opinion at p. 7).

While it is true that some of the information in the IAD file might have served to corroborate the impeachment of Falgout and Robertson if any such impeachment had been attempted, as the Court of Appeals noted, the testimony of Amos at trial fully developed the genesis of Falgout's and Robertson's involvement in the investigation of the case. Of greater importance is the fact that Falgout and Robertson were *not called as witnesses by either party.* Thus, the present situation is wholly unlike that presented in either *United States v. Bagley,* 473 U.S. —, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) or *Lindsey v. King,* 769 F.2d 1034 (5th Cir. 1985), in which the prosecution had withheld impeachment evidence concerning principle witnesses. *See, Lindsey,* at 1042. Rather, the Petitioner claimed that he was not allowed access to documents which might have corroborated impeaching evidence *already before the jury,* where such evidence might at most have resulted in impeachment of two *potential* witnesses who did not in fact testify at trial and whose existence and extent of involvement in the case was known to the Petitioner prior to trial.

To argue that the instant case presents a factual vehicle to test a proper standard to be used in determining the meaning of the term "material" to the defense of an accused in the context of a prosecutor's failure to disclose impeachment evidence, an issue only recently addressed by this Court in *Bagley,* is absurd.

Likewise, because there was no basis to conclude that any of the impeachment evidence tendered to the trial court by prosecutor in good faith compliance with *Agurs* was such that it 1) "might have effected the outcome of the trial," *Agurs,* at 104, 96 S.Ct. at 2397, 2) "created a reasonable doubt where one did not exist," *Id.* at 112, 96 S.Ct. at 2401, 3) was reasonably likely to have produced a different outcome at trial, *Bagley, supra,* 473 U.S. at —, 105 S.Ct. at 3384, *or* 4) was reasonably likely to affect "the judgment of the trier of fact," *Bagley,* 473 U.S. —, 105 S.Ct. at 3399. (opinion of Stevens, J.), any further review by this Court to determine a "legal standard" to measure the conduct of a prosecutor or a trial judge in tendering or reviewing legally exculpatory material should wait for a case where the accused can attempt to demonstrate that the "suppressed" evidence at least arguably falls within one of the above categories and was not before the jury from another source.

II.

The Court of Appeals correctly decided the Petitioner's double jeopardy claim on State procedural grounds. Even if this basis for the decision below was incorrect, the facts of the case clearly show that the trial court did not abuse its discretion in holding that the jurors in question were disabled, and therefore "manifest necessity" required the termination of Petitioner's first trial. Accordingly, Petitioner's double jeopardy rights were not violated in the instant case.

The precise nature of Petitioner's third and fourth questions is rather difficult to ascertain, except that the Petitioner is dissatisfied with the Court of Appeals' determination that his first ground of error below could be

disposed of on State procedural grounds (see opinion of Court of Appeals at p. 2), *i.e.*, that the petitioner's oral motion for a dismissal of the prosecution of double jeopardy failed to comply with the requirements of TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon Supp. 1985) and § 27.06 (Vernon 1966) that such motions be in writing and verified, and thus was not preserved for review. Surely, the Texas Code's requirement that pleas of former jeopardy must be made in writing can present no constitutional issue since Federal Rule Crim. 12 (b), requires that this type of motion may be required to be in writing, at the option of the trial judge. Accordingly, the Court of Appeals correctly decided that petitioner had failed to comply with State procedural law in raising his double jeopardy claim. Appellant does not suggest that the written pleading rule does not serve a legitimate State interest or that it was applied to him in order to avoid review by this Court. *See, Sullivan v. Little Hunting Park,* 396 U.S. 229, 233-234, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). Nor is this a case where the State court has ignored Petitioner's procedural default.

By citation to *Robinson v. Wade,* 686 F.2d 298 (5th Cir. 1982), Petitioner may be focusing on a footnote in that case which criticized the Texas procedural rules concerning double jeopardy claims on the ground that because "facts concerning the special plea are determined in the course of the trial on the merits," that the special plea "is a mechanism for avoidance of reconviction, not retrial." *Robinson,* at 302, n. 3. However, in the instant case, following the unfavorable ruling by the trial court, Petitioner took no further action to protect himself from

retrial. Accordingly, Petitioner waived any such protections, and more to the point, any action by this Court would not serve to protect Petitioner's double jeopardy rights against a retrial.

Finally, whatever the procedural merits of the Petitioner's position, his petition presents an unlikely vehicle for relief since the merits of his double jeopardy claim are dubious at best. Petitioner conceded below that Texas law does not permit the return of a verdict by less than eleven jurors in a felony case. *See,* TEX. CODE CRIM. PROC. ANN. art. 36.29 (Vernon Supp. 1986) and 36.33 (Vernon 1981).[4] Petitioner did not challenge the constitutionality of this rule in the State courts, rather he asserted that the trial court had abused its discretion in finding that the two jurors in question were disabled in failing to consider grounds less drastic than the declaration of a mistrial.

As to the trial court's determination that the jurors were disabled, the trial court's determinations and perceptions in this regard must be given "great deference." *Hameed v. Jones,* 750 F.2d 154, 161 (1st Cir. 1984), *cert. denied,* 105 S.Ct. 2677, 86 L.Ed.2d 695; *Arizona v. Washington, supra,* 434 U.S. at 510, 89 S.Ct. at 832. In this context, it must be remembered that Petitioner, by his failure to object at trial, implicitly conceded that the cru-

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[4] Thus if the trial court did not abuse its discretion in concluding that the jurors were disabled for an indefinite period of time, clearly the termination of Petitioner's first trial was a "manifest necessity" under the analysis of *Illinois v. Sommerville,* 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973), since any verdict rendered by less than eleven jurors would have been reversed on appeal.

cial eleventh juror was *at least temporarily* disabled. As to the suggestion that the trial court did not *consider* a remedy short of a mistrial, this claim is *refuted* by the record.

In addition, while not dispositive, Petitioner has not demonstrated any specific prejudice to him from the mistrial ruling. *Arizona v. Washington, supra,* 434 U.S. at 516, 98 S.Ct. at 835-836, n. 35.

III.

The Petitioner's ineffectiveness of counsel claim does not even facially present a federal question since Petitioner does not attempt to demonstrate the ineffectiveness of counsel resulted in any actual "prejudice" to the Petitioner as that term is defined in Strickland v. Washington.

Petitioner's contention that his counsel's failure to follow the Texas pleading requirements regarding a special plea asserting that his first trial was improperly terminated deprived him of effective assistance of counsel at trial, is utterly devoid of merit.

Under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), cited by Petitioner, in order to make out a successful ineffectiveness of counsel claim, an accused must demonstrate 1) that counsel's performance was deficient to the point that he was "not functioning as 'counsel'," and 2) that counsel's errors "prejudiced the defendant" to the extent that he was deprived of a fair trial, "a trial whose result was reliable." 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. An error by counsel, even if professionally unreasonable, does not warrant reversal if the error had no effect on the

judgment. 466 U.S. at 691, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. In assessing the prejudice resulting from deficient performance by trial counsel a court should presume, absent challenge to the evidence on sufficiency grounds, "that the judge or jury acted according to law." 466 U.S. at 494, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

In the instant case, while the Court of Appeals resolved the double jeopardy issue on procedural default grounds, the trial court did not utilize these grounds in refusing Petitioner's special plea. Rather, the trial court correctly held that the jurors had become disabled. Because the Petitioner makes no claim concerning the correctness of this determination by the trial court, and because without such a showing Petitioner can not demonstrate a fulfillment of the "prejudice" component of the *Strickland* test, especially in light of the presumption that the trial court ruled correctly on the merits of his claim, his petition presents no basis for review of his conviction by this Court on ineffectiveness of counsel grounds. Because the Petitioner's first trial was terminated before *any* testimony was presented, it is unlikely that Petitioner could show any specific prejudice occasioned by the termination of that trial. *Arizona v. Washington, supra.*

CONCLUSION

For the reasons stated herein, the petition filed in this case should be denied.

Respectfully submitted,

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October 8, 1986

/s/ JEFFREY B. KECK

APPENDIX

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STATUTORY PROVISIONS

1) TEXAS CODE OF CRIMINAL PROCEDURE:

Art. 36.29. If a Juror Becomes Ill

(a) Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman. Except as provided in Subsection (b) of this section, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

(b) If alternate jurors have been selected in a capital case and a juror dies or becomes disabled from sitting at any time before the charge of the court is read to the jury, the alternate juror whose name was called first under Article 35.26 of this code shall replace the dead or disabled juror. Likewise, if another juror dies or becomes disabled from sitting before the charge of the court is read to the jury, the other alternate juror shall replace the second juror to die or become disabled.

(c) After the charge of the court is read to the jury, if any one of them becomes so sick as to prevent the continuance of his duty, or any accident of circumstance occurs to prevent their being kept together under circumstances under which the law or the instructions of the court requires that they be kept together, the jury shall be discharged.

(d) After the charge of the court is read to the jury, the court shall discharge an alternate juror who has not replaced a juror.

Art. 36.33. Discharge Without Verdict

When a jury has been discharged, as provided in the four preceding Articles, without having rendered a verdict, the cause may be again tried at the same or another term.

2) TEXAS PENAL CODE

§ 15.03. Criminal Solicitation

(a) A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

(c) It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited;

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution;

(3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) the felony solicited was actually committed.

(d) An offense under this section is:

(1) a felony of the first degree if the offense solicited is a capital offense; or

(2) a felony of the second degree if the offense solicited is a felony of the first degree.

§ 29.02. Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

§ 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

(b) An offense under this section is a felony of the first degree.

ORDER DECLARING MISTRIAL

F82-85921 JV

THE STATE OF TEXAS IN THE 292ND JUDICIAL
VS. DISTRICT COURT
JOHN DONALD MASSOUD DALLAS COUNTY,
TEXAS

ORDER DECLARING MISTRIAL

On this the 6th day of July, 1983, it came to the attention of the Court that 2 of the 12 jurors empaneled in the above numbered and styled cause were disabled from sitting, leaving only 10 jurors to hear the case.

One juror testified that she was currently suffering from a condition of emotional anxiety and depression which would impair her and inhibit her from fully and fairly performing the functions of a juror.

Another juror testified that his brother had committed suicide in the early morning hours of July 6, 1983, and that he had just received notice of his brother's death before coming to the courthouse. He testified to the effect that his brother's death and the surrounding circumstances would impair him and inhibit him from fully and fairly performing the functions of a juror.

The Court discharged said jurors as disabled. Being improper for the trial to proceed with 10 jurors, it is proper to terminate this criminal trial after jeopardy has attached, since it is required by "manifest necessity" and the "ends of public justice." *See Schaffer v. State,* 649 S.W.2d 637, 638-639 (Tex. Crim. App. 1983) and cases cited therein.

A MISTRIAL, THEREFORE, IS HEREBY DECLARED in this cause.

/s/ Michael Keasler
Judge Presiding